facts in issue.[10] It will therefore be introduced when either of the doctrines of *res judicata* is invoked. However, the judgment itself is, in neither of these cases, evidence: in one case it operates to terminate the action, in the other it excludes evidence as to the matter formerly litigated. The fact of judgment may, however, have a true evidentiary value, as when a prior conviction is shown for the purpose of impeaching the credibility of a witness.[11] And the judgment, or even a verdict, being the solemn determination of the tribunal as to facts in issue, may be given in evidence even against strangers, in proof of a fact concerning which reputation would be admissible.[12] But in such a case the judgment would have only a *prima facie* effect,[13] and it would seem that only a judgment rendered in a controversial proceeding *inter partes* has the requisite guaranty of truth.

A recent case, *Illinois Steel Co.* v. *Industrial Commission*,[14] raises the questions involved in this discussion. A common-law marriage was in issue, and the court held it improper to admit, in proof of this fact, the order of a probate court, between different parties, reciting the finding of the court in that matter. Obviously neither of the doctrines of *res judicata* can be invoked. Nor can the judgment be admitted as evidence, for it seems that reputation is inadmissible in proof of a common-law marriage in the absence of supporting evidence of cohabitation as husband and wife.[15] In the principal case this was not only lacking, but there was evidence that the intercourse between the parties was adulterous in its inception. Under these circumstances, the judgment of the probate court might well tend to prejudice, rather than aid, the jury.

A PARTNERSHIP AND A JOINT ADVENTURE DISTINGUISHED. — In the recent case of *Brown* v. *Leach*,[1] a joint adventurer sued for contribution of profits earned by his colleague after the latter had ostensibly withdrawn from the enterprise with a view to excluding the plaintiff from participation in the profits which he was reasonably certain could be made. It was declared that the plaintiff was entitled to share in these profits in accordance with the terms of the joint adventure. In the course of this opinion the court said: "A joint adventure is subject to the same rules as a technical partnership." With regard to the issue before the court this statement is true, since in both there is a fiduciary relation between the parties and a consequent duty to share all profits accruing from the subject matter of the undertaking.[2] But as a general

[10] See Littleton *v.* Richardson, 34 N. H. 179, 187 (1856); Spencer *v.* Dearth, 43 Vt. 98, 105 (1870).

[11] See 1 GREENLEAF, EVIDENCE, 16 ed., § 527.

[12] Pile *v.* McBratney, 15 Ill. 314, 319 (1853); Chirac *v.* Reinecker, 2 Pet. (U. S.) 613 (1829); Reed *v.* Jackson, 1 East, 355 (1801).

[13] See 2 BLACK, JUDGMENTS, 2 ed., § 606.

[14] 125 N. E. 252 (Ill.). See RECENT CASES, p. 865.

[15] See 1 WHARTON, EVIDENCE, 3 ed., § 84.

[1] 178 N. Y. Supp. 319 (1919). See RECENT CASES, *infra*, p. 868.

[2] Reid *v.* Shaffer, 249 Fed. 553 (1918); Ingram *v.* Johnston, 176 Pac. (Cal. App.) 54 (1918); Calkins *v.* Worth, 215 Ill. 78, 74 N. E. 81 (1905); Nelson *v.* Lindsey, 179 Iowa, 862, 162 N. W. 3 (1917); Irvine *v.* Campbell, 121 Minn. 192, 141 N. W. 108

statement it is not entirely accurate. For instance, ordinarily one partner cannot maintain an action at law against his colleague on a claim growing out of firm transactions until there has been an accounting in equity;[3] but there is no such limitation on the right of a joint adventurer.[4] Likewise, under the ordinary statutes a corporation cannot enter a partnership,[5] though it may participate in a joint adventure.[6]

These considerations suggest the inquiry: In what respect does a joint adventure differ essentially from a partnership? The New Jersey court has intimated that the distinction lies in the fact that there is no mutual agency in the former, as there is in the latter.[7] But this distinction seems unsatisfactory, since it assumes that mutual agency is a test of a partnership, while it would seem to be merely an incident attached to that relation.[8]

A joint adventure has been defined as an association of two or more persons to carry out a single business enterprise for profit.[9] The Uniform Partnership Act defines a partnership as an association of two or more persons to carry on as co-owners a business for profit.[10] Two possible distinctions are apparent: (1) that while a partnership is formed for the transaction of a general business of a particular kind, a joint adventure relates to a single transaction, (2) that in a partnership each member is co-owner of a *business*, — a fact that does not exist in a joint adventure. The former has sometimes been expressed by the courts as the main difference.[11] But there are numerous decisions to the effect that there can be a partnership for a single transaction.[12] Even though this distinction did exist it is difficult to see how it could be a useful guide to the courts.

The real difference appears in the second suggestion. A partnership

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(1913); Botsford *v.* Van Riper, 33 Nev. 156, 110 Pac. 705 (1910); Selwyn & Co. *v.* Waller, 212 N. Y. 507, 106 N. E. 321 (1914); Knudson *v.* George, 157 Wis. 520, 147 N. W. 1003 (1914).

[3] Wills *v.* Andrews, 75 So. (Fla.) 618 (1917); Kelley *v.* Ramsey, 176 Ky. 584, 195 S. W. 1111 (1917); Dalury *v.* Rezinas, 183 App. Div. 456, 170 N. Y. Supp. 1045 (1918); Cobb *v.* Martin, 32 Okl. 596, 123 Pac. 422 (1912). See LINDLEY, PARTNERSHIP, 8 ed., 635.

[4] Hurley *v.* Walton, 63 Ill. 260 (1872); McIntire *v.* Carr, 164 Mich. 37, 128 N. W. 1079 (1910); Petersen *v.* Nichols, 90 Wash. 398, 156 Pac. 406 (1916); Davidor *v.* Bradford, 129 Wis. 524, 109 N. W. 576 (1906).

[5] Whittenton Mills *v.* Upton, 10 Gray (Mass.), 582 (1858); Bishop *v.* American Preserver's Co., 157 Ill. 284, 41 N. E. 765 (1890).

[6] Bates *v.* Coronado Beach Co., 109 Cal. 160, 41 Pac. 855 (1895); C. & A. R. R. Co. *v.* Mulford, 162 Ill. 522, 44 N. E. 861 (1896); Mestier & Co. *v.* Chevalier Paving Co., 108 La. 562, 32 So. 520 (1901).

[7] Jackson *v.* Hooper, 76 N. J. Eq. 185, 74 Atl. 130 (1909).

[8] Meehan *v.* Valentine, 145 U. S. 611 (1891); Webster *v.* Clark, 34 Fla. 637, 16 So. 601 (1894); Boreing *v.* Wilson, 128 Ky. 570, 108 S. W. 914 (1908); Pooley *v.* Driver, 5 Ch. D. 458 (1876).

[9] See 2 ROWLEY, MODERN LAW OF PARTNERSHIP, § 975.

[10] UNIFORM PARTNERSHIP ACT, § 6.

[11] Saunders *v.* McDonough, 191 Ala. 119, 67 So. 591 (1914); Goss *v.* Lanin, 170 Iowa, 57, 152 N. W. 43 (1915); Reece *v.* Rhoades, 25 Wyo. 91, 165 Pac. 449 (1917).

[12] Shackleford *v.* Williams, 182 Ala. 87, 62 So. 54 (1913); Milligan *v.* Mackinlay, 209 Ill. 358, 70 N. E. 685 (1904); Grant *v.* McArthur's Ex'rs, 153 Ky. 356, 155 S. W. 732 (1913); Jones *v.* Davies, 60 Kan. 309, 56 Pac. 484 (1899); Rush *v.* First Nat'l Bank, 160 S. W. (Tex. Civ. App.) 319 (1913); Williamson *v.* Nigh, 58 W. Va. 629, 53 S. E. 124 (1906).

involves the conception of a business, — an entity, in a mercantile sense at least, separate and distinct from the individual affairs of the members.[13] Such an entity cannot be created by the doing of a single act.[14] It is the performance of a series of acts, all done for the same ultimate purpose of profit under the joint agreement so as to be bound together into a unit, that underlies the conception in the minds of mercantile men of an entity quite distinct from their individual affairs; and this entity the law recognizes to a certain extent and to it attaches certain incidents. But if the joint agreement is such that it does not contemplate the creation of such an entity, there is no need of turning to the complex law of partnership for a guide, but each problem arising thereunder can be solved by the ordinary law of contracts.

This distinguishing feature is consistent with incidental differences which the cases recognize. Mutual agency of partners is an established necessary incident of a partnership, though it may be restricted *inter se*. It is a sensible rule which gives the creators of an entity equal authority to act for it.[15] In a joint adventure, however, there is no question as to the relation of several individuals to a distinct entity, but merely of the relation of several individuals *inter se;* and obviously, to find that one is agent of the other, we should find that authority so to act was given by that other by agreement, express or implied.[16] So also on the insolvency of partners, by the law of partnership, firm creditors have priority over the separate creditors as to the firm property.[17] But the insolvency of joint adventurers should not give the creditors of the joint debtors any priority over their separate creditors to the joint property since the credit has not been extended to, or enriched, a distinct entity, but the individuals alone.

OBLIGATION OF AGGRIEVED CONTRACTING PARTY TO ACCEPT NEW OFFER OF DEFAULTER TO OBVIATE AVOIDABLE DAMAGE. — The funda-

[13] See BURDICK, PARTNERSHIP, 3 ed., 21–25.

[14] Compare cases holding that the doing of a single act within a state is not "transacting or carrying on business within the state." Penn. Collieries Co. *v.* McKeever, 183 N. Y. 98, 75 N. E. 935 (1905); Ammons *v.* Brunswick-Balke-Collender Co., 141 Fed. 570 (1905); Kirven *v.* Va.-Car. Chemical Co., 145 Fed. 288 (1906); Allegheny Co. *v.* Allen, 69 N. J. L. 270, 55 Atl. 724 (1903); State *v.* Robb-Lawrence Co., 15 No. Dak. 55, 106 N. W. 406; Keene Guaranty Sav. Bank *v.* Lawrence, 32 Wash. 572, 73 Pac. 680 (1903). See 5 THOMPSON, CORPORATIONS, 2 ed., § 6674.

The same thought is found in cases in which it is held that credits acquired in the course of business of lending are taxable as business stock having a *situs* at the place of business, though intangible credits can have no actual *situs*. The series of credits is regarded as creating an entity, the stock in trade. Metropolitan Life Insurance Co. *v.* New Orleans, 205 U. S. 395 (1907); Adams *v.* Colonial & U. S. Mortgage Co., 82 Miss. 263, 34 So. 482 (1903). See Joseph H. Beale, "Jurisdiction to Tax," 32 HARV. L. REV. 609–613.

[15] Under the legal-person theory of a partnership, each is agent for the legal person, the firm. See the remarks of Jessel, M. R., Pooley *v.* Driver, *supra*, note 8, at page 476. Under the aggregate theory, each acts for the individuals composing the firm. Cox *v.* Hickman, 8 H. L. Cas. 268 (1860).

[16] Strohschein *v.* Kranich, 157 Mich. 335, 122 N. W. 178 (1909); Smith *v.* First Nat'l Bank of Albany, 151 App. Div. 317, 135 N. Y. Supp. 985 (1912); Jones *v.* Gould, 123 App. Div. 236, 108 N. Y. Supp. 31 (1908).

[17] See 1 ROWLEY, MODERN LAW OF PARTNERSHIP, § 535 and note.